

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1206

To be argued by
EUGENE NEAL KAPLAN

United States Court of Appeals FOR THE SECOND CIRCUIT

Docket No. 77-1206

UNITED STATES OF AMERICA,

*B
P/S*
Appellee.

—v.—

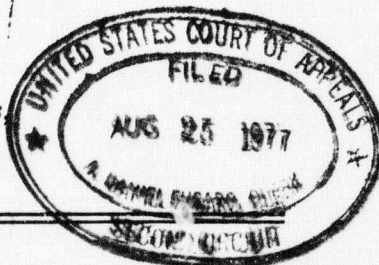
SY YOAKUM GUTHRIE, III,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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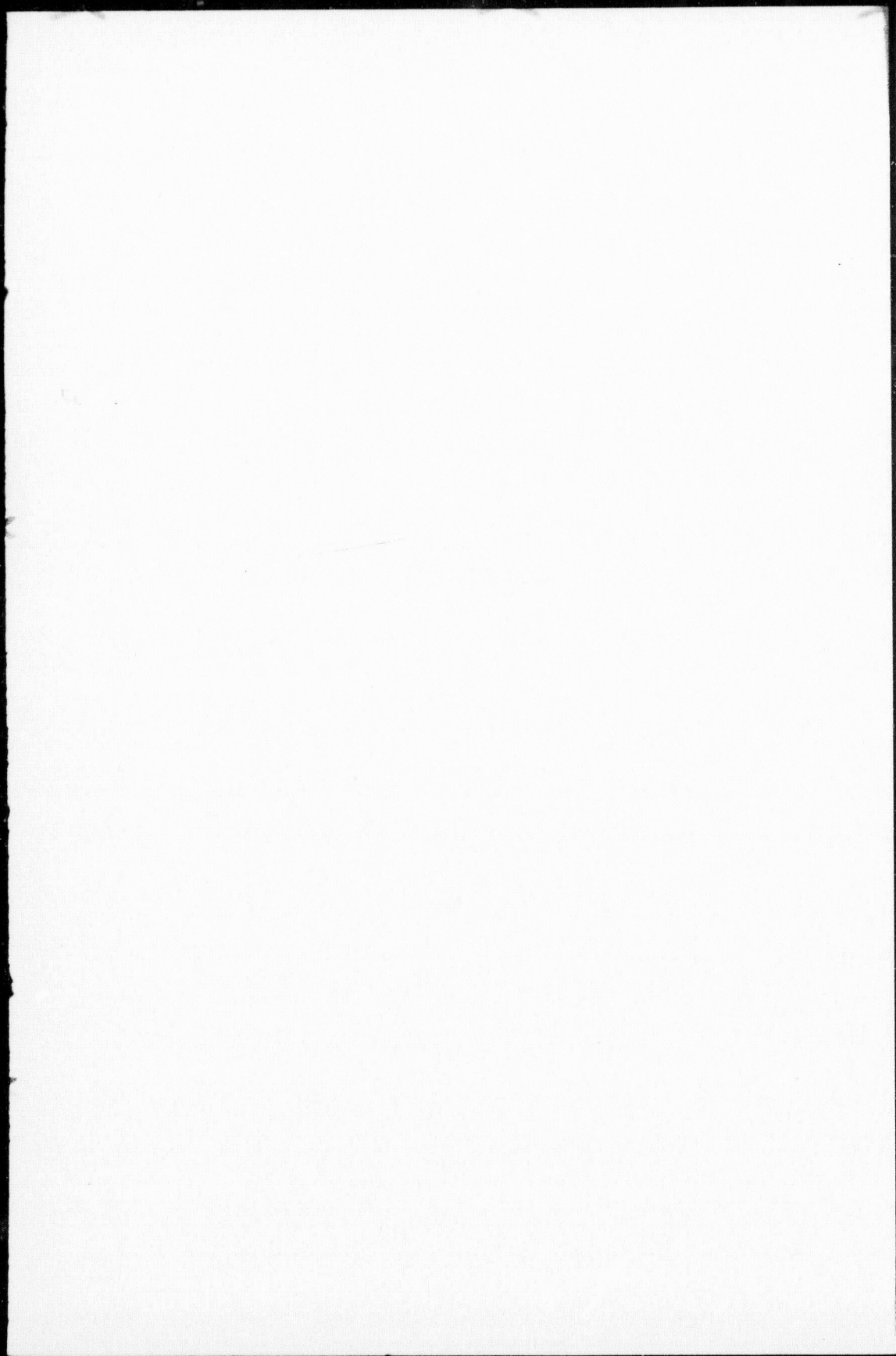


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**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-1206

UNITED STATES OF AMERICA,

Appellee,

—v.—

SY YOAKUM GUTHRIE, III,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Sy Yoakum Guthrie, III, appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on January 11, 1977, following a two-week trial before the Honorable Dudley B. Bonsal, United States District Judge, and a jury.

Indictment 76 Cr. 349, filed August 5, 1976, charged Guthrie, in six counts, with devising and participating in, during the fall of 1975 and early winter of 1976, a series of interrelated "advance fee" schemes to defraud two principal victims, Edward Fucillo and David Wilson, by means of false and fraudulent representations and promises that so-called "financial guarantee" insurance bonds could rapidly be secured by Guthrie and his five co-

defendants * for use by these victims as collateral for needed bank loans, in violation of the federal laws prohibiting wire fraud, travel fraud and aiding and abetting such frauds (respectively, Sections 1343, 2314 and 2 of Title 18, United States Code).

Trial against Guthrie began on November 16, 1976, with respect to Counts One through Six of the Indictment.** After the Government's proof, Judge Bonsal dismissed the travel fraud charge (Count 6). (Tr. 995-

* The Indictment named the following co-defendants: Richard Mansford Cauble (Counts 1-7); Harry Goldberg (Counts 1-6, 8 and 9); Stanley Jerome ("Jerry") Silver (Counts 1-6 and 10); William Everett Glass (Counts 3-6 and 11); and Frederic Wohlfeld (Counts 3-6 and 12), who were charged both with joining Guthrie in these fraudulent schemes (Counts 1-6) and with either perjury (Section 1623 of Title 18, United States Code) or obstruction of justice (Section 1503 of Title 18, United States Code), as well (Counts 7-12).

** Prior to trial, each of Guthrie's co-defendants had pled guilty to one or more charges against them. Thus (in order of their appearance in the Indictment), on November 15, 1976, Cauble pled guilty to two counts of wire fraud (Counts 2 and 4); on January 5, 1977, his 2 year jail sentence was suspended and he was placed on probation for 3 years. On November 12, 1976, Goldberg pled guilty to a superseding information charging him with conspiracy to commit frauds and obstruct justice (Section 371, of Title 18, United States Code); on January 7, 1977, he was sentenced to 2 years probation and fined \$3,000. On November 8, 1976, Silver pled guilty to one count of obstruction of justice (Count 10); he was sentenced to 2 years probation with the special condition that he make \$2500 restitution to David Wilson. On October 29, 1976, Glass pled guilty to a superseding information charging him with conspiracy to commit frauds and obstruct justice; on January 6, 1977, he was sentenced to 2 years probation with the special condition that he make \$5000 restitution to David Wilson. On November 16, 1976, Wohlfeld pled guilty to a superseding information charging him with obstruction of justice; on April 13, 1977, he was sentenced to 3 years probation with the special condition that he make restitution to David Wilson in an amount specified by his supervising probation officer.

96).* On November 30, 1976, the jury returned verdicts of guilty on the remaining five wire fraud counts (Counts 1-5).

On January 11, 1977, Judge Bonsal, taking note "that this was a sordid kind of white collar crime . . . to induce money out of people . . . who were in an emergency situation to get financing" (Snt. Tr. 27), sentenced Guthrie to a term of two years imprisonment on Counts One through Five, the sentence on each count to run concurrently with each other, but consecutively to an 18 month sentence earlier imposed on Guthrie by the United States District Court for the Central District of California. See *infra* Point II. Guthrie is presently serving his sentence.**

Statement of Facts

The Government's Case

In addition to proving Guthrie to be an unethical liar with whom it was a mistake to do business, as the defendant now concedes (App. Br. 25), the Government's case firmly—indeed, overwhelmingly—established that he

* Abbreviations used in this brief are as follows: "Tr." refers to the trial transcript; "Snt. Tr." refers to the sentencing transcript; "App. Br." refers to the appellant's brief; "GX" refers to Government Exhibits at trial; and "DX" refers to defendant's exhibits at trial.

** Following the imposition of sentence on January 11, 1977, Judge Bonsal released Guthrie on bail pending this appeal. For the next six months, Guthrie failed to perfect this appeal. In response to the dilatory conduct by Guthrie, on July 19, 1977, this Court granted the Government's motion to remand the defendant and directed that he surrender to the United States District Court on July 20, 1977. *United States v. Sy Yoakum Guthrie, III*, Dkt. No. 77-1206 (2d Cir., July 19, 1977) (Order).

was an outright and brazen swindler who had committed the frauds charged in Counts One through Five of the Indictment.* Nonetheless on appeal, Guthrie challenges the sufficiency of the evidence against him. Consequently, it is necessary to recapitulate here in some detail the Government's proof as to those frauds.

This was not, as defense counsel argued to the jury, a case about "the American way of doing business." (Tr. 1101). Rather, the Government's proof demonstrated, and the jury concluded, that Guthrie, assisted by his co-defendants, had devised and engaged in a series of intentional swindles designed to fraudulently secure thousands of dollars in "advance fees".

To this end, Guthrie's plan was simple: Upon learning that one of his co-defendants (Cauble or Silver) had a victim (Edward Fucillo and David Wilson) in need of rapid financial assistance, and even before that time, Guthrie falsely represented that he was able, through various sources, to have "financial guarantee" insurance bonds issued by major insurance companies, which the victims could then use as collateral for their needed loans.** Relying on these and other such false representations by Guthrie, to themselves and others, these co-defendants were able to induce the victims to put up several thousand dollars in advance-fees to cover the "initial expenses" of obtaining the bonds, which Guthrie and his co-defendants claimed would be rapidly forth-

* The Government proved the fraud charged in Count Six of the Indictment, which merely was another aspect of the Wilson fraud, *infra*, as well. Judge Bonsal, however, chose to dismiss this Count for jurisdictional reasons. (Tr. 995-96).

** The so-called "financial guarantee" bond is a form of surety bond, issued by an insurance company, which acts to guarantee the repayment of the principal of a loan made by a bank or other financial institution. (*E.g.*, Tr. 58-59, 183, 290). Use of such bonds as collateral is, however, highly unusual. See, *e.g.*, Wall Street Journal, Jan. 30, 1976, at 14, Col. 3.

coming. Next, after Guthrie and his confederates had pocketed these advance payments and these co-defendants had become aware that Guthrie could not and never could secure the insurance bonds that he had falsely promised, Guthrie and, to varying degrees, his confederates, simply created one lie and false excuse after another—*i.e.*, that the bond was ready, had been approved, had been issued, could be picked up, and so on—all designed to lull the victims into a false sense of security and, perhaps most importantly, conceal the fraud. Needless to say, in the end, no bonds were ever issued or delivered.

A. The Edward Fucillo Fraud (Counts 1 and 2).*

In September 1975, Madison Investment Corporation, an enterprise that owned a block of land in Tallahassee, Florida,** on which it proposed to construct a hotel and office building complex, was in rapid need of \$750,000 for start-up expenses, interest reserves, architect fees and the like. (Tr. 44-46). Edward Fucillo, its president (Tr. 44),*** set about the task of seeking out this needed funding. (Tr. 46).

* In proving this fraud, the Government's direct case consisted of the testimony of Edward Fucillo (Tr. 43-173); Jack Smith (Tr. 173-275); co-defendants William Everett Glass (Tr. 276-500); Stanley Jerome ("Jerry") Silver (Tr. 503-650); and Richard Mansford Cauble (Tr. 651-834) and the exhibits accompanying their testimony.

** This real estate was valued at about \$4 million and mortgaged for about \$2.25 million. (Tr. 44-45). The existence of so large a first mortgage both created a need for and made it difficult to obtain additional funding. (Tr. 123ff).

*** Fucillo, in addition, was corporate secretary of General Motors Acceptance Corp. and an attorney. (Tr. 43-44).

Fucillo first sought this needed funding from several New York banks, but was unsuccessful. (Tr. 46). He then turned to various financial brokers for assistance. (Tr. 47; 126). Through Des Moines broker Donald Tunning, Fucillo contacted Florida broker Jack Smith, who, in turn, placed him in communication with co-defendant Richard Cauble. (Tr. 47-50; 177ff; 663ff).^{*} After discussing the financial needs of Madison Investment Corporation with him (Tr. 51-52; 55; 664), Cauble, along with co-defendant William Glass, first took Fucillo to the United Americas Bank ^{**} in an attempt to secure a loan. (Tr. 53-56; 286ff; 664ff). After meeting with the bank's officials, such a loan was refused. (Tr. 56; 288; 664-65). At this point, Guthrie entered on the scene. (Tr. 665).

Prior to his meeting Fucillo, Cauble had met Guthrie, who he thought was a former banker, and financier. (Tr. 68; 283; 657ff; 508). At that time, Guthrie informed Cauble that he was able to assist in the funding of "borderline" financial packages by means of securing financial guarantee bonds, from one of three sources, to be used as collateral for loans. (Tr. 659-62).^{***} Aware of

^{*} Cauble worked out of the law offices of Glass & Glass, of which co-defendant William Glass was a partner, placing marginal financial packages and engaging in other business affairs. (Tr. 281, 659). Often, because of this association, Cauble was represented to be an attorney. (*E.g.*, Tr. 952). He was not. (Tr. 652).

^{**} The United Americas Bank was located at 50 Broadway, New York, New York, the same building where Glass & Glass had its law offices. (Tr. 55, 286). The law firm maintained a relationship with this bank, and, for this and other reasons, a loan to Fucillo at first blush appeared possible. (Tr. 286-87).

^{***} The three sources of financial guarantee bonds initially mentioned to Cauble by Guthrie were: (1) co-defendant Harry Goldberg; (2) Mr. Hayres of American Manufacturers Mutual Insurance Co. ("AMMIC"); and (3) Mr. Hopkins of Sentry Fin-

[Footnote continued on following page]

Guthrie's self-proclaimed ability to secure these bonds, Cauble turned to him for assistance once the bank had refused Fucillo a loan. (Tr. 57; 238; 665).

At first, in November 1975, Guthrie falsely assured Cauble that he could rapidly secure an AMMIC bond for use by Fucillo. (Tr. 673).^{*} After several weeks passed with Guthrie unable to deliver an AMMIC bond, he next arranged for Cauble to meet with a second of his bonding sources, co-defendant Harry Goldberg. (Tr. 673). During the last week in November, Cauble met with Goldberg and presented Fucillo's financial problem. (Tr. 665-66).^{**} Goldberg stated that a bond for Fucillo appeared possible and that he would further advise Guthrie. (Tr. 666). On the heels of this meeting, Guthrie falsely advised Cauble that Goldberg was prepared to issue a bond for Fucillo immediately (Tr. 666; 673-75) and directed Cauble to take Fucillo "over to Jerry Silver to

ance Co. ("Sentry"). (Tr. 660-62). At trial, the proof demonstrated that each of these three enterprises could neither issue nor deliver bonds as Guthrie had claimed. For example, Guthrie could never produce Haynes in New York to close on any AMMIC bonds (Tr. 520), despite the fact that he had freely represented an ability in this regard in order to secure an advance-fee from Wilson (Tr. 513ff; GX 30A). Similarly, Hopkins had no authority to issue Sentry bonds (Tr. 661); this fact did not prevent Guthrie from supplying such a bond, executed by Hopkins, to Cauble for delivery to a client. (Tr. 825-27; DX D). Finally, the proof (summarized *infra*) demonstrated that Goldberg was totally unable to secure any financial guarantee bonds, despite both Guthrie's and Goldberg's numerous representations to the contrary.

^{*} In addition to these false assurances provided to Cauble, Guthrie similarly lied to Jack Smith concerning the availability of an AMMIC bond. (Tr. 182ff, 189-91, 225, 228).

^{**} Co-defendant Jerry Silver also attended this meeting (Tr. 521), but for a different purpose: Guthrie had sent him to meet with Goldberg concerning the Wilson financial request, discussed *infra*.

set it up so that there was money put up in front". (Tr. 667).*

On December 3, 1975, Cauble took Fucillo to Silver's office, where Silver, after stating "that he was sure he could get a guarantee bond which could be funded" ** (Tr. 58), entered into an agreement with Fucillo obligating Silver (and his firm) to deliver a \$750,000 financial guarantee bond to Fucillo within 14 business days. (Tr. 58-59; 526ff; 668ff; GX 1). This agreement further called for Fucillo to make a good faith deposit of \$7500 to Silver (GX 1); however, this provision was subsequently modified to require the posting of only a \$3750 "advance-fee". (Tr. 62; 529). Thereafter, on December 5th, Fucillo caused the wire transfer of \$3750 to be made by Madison Investment Corporation's bank in Tallahassee to Silver's corporate bank account in New York. (Tr. 62-63; 531; 676;GX 155).***

Following this, on December 8, 1975, Guthrie telephoned Jack Smith to advise him that the only thing delaying the issuance of Fucillo's bond was his—Guthrie's—absence from New York in California (where he was then on trial). (Tr. 196). As Smith testified: "He informed me that he, Mr. Guthrie, was in California and needed to come back to New York, *he would be able to*

* Guthrie suggested that Fucillo be taken to Jerry Silver because neither he nor Cauble projected the kind of "substantiality" which would induce the payment of an "advance-fee." (Tr. 667-68).

** Silver testified that, in addition to Guthrie, Goldberg had advised him that "he [Goldberg] could secure bonds" for Fucillo. (Tr. 596).

*** Fucillo paid this "advance-fee" not only in light of Silver's contractual representations and the previous assurances which he had received, but also after discussing the propriety of this fee payment with Jack Smith, who had, by then, been falsely assured by Guthrie, Cauble and Silver that Fucillo's bond was imminent. (Tr. 192; 194-95, 253, 529, 675-76).

immediately secure the bond within a matter of 24 hours [emphasis supplied]." (Tr. 196; cf. Tr. 67). Smith thereupon wired an airline ticket to Guthrie, who returned to New York that same night. (Tr. 197ff; GX 153).

To his dismay on returning to New York, Guthrie learned that Silver had departed for a vacation in Europe, leaving him without access to any of Fucillo's front money. (Tr. 677).

Fazed only briefly by this, Guthrie met with Fucillo and Cauble the next evening in the restaurant of his hotel and represented to Fucillo that his bond would be rapidly obtained. (Tr. 67-69; 679). The next day, December 10th, Guthrie falsely advised Cauble that Fucillo's bond was ready and that only a \$2500 payment to bonding agent Goldberg prevented its delivery. (Tr. 676ff). Guthrie further falsely told Cauble that he had spoken with Silver in Europe and had been advised to collect this \$2500 directly from Fucillo. (Tr. 677).^{*} Finally, Guthrie advised that this \$2500 payment had to be in *cash*. (Tr. 677).

On receiving these instructions from Guthrie, Cauble went to Fucillo's office in the G.M. Building and told him "that he had the bond and it just had to be paid for. It was \$2500 that was needed." (Tr. 70; 678). Fucillo, aware not only of what Cauble had just said, but also of what Guthrie had told him the night before, thereupon cashed a \$2500 check (Tr. 70),^{**} gave the cash to Cauble (Tr. 71; 678) and, in return, received a receipt from him. (Tr. 678-79; GX 2).

^{*} Silver testified that during his European vacation he spoke only to his associate, Paul Heischuber, and his employee, Fern Seigal, concerning these bonding transactions. (Tr. 532-33).

^{**} Fucillo was immediately reimbursed for this \$2500 by means of a wire transfer from Madison Investment in Florida. (Tr. 70-72; GX 154).

With this cash in hand, Cauble returned to Guthrie's hotel suite. (Tr. 679-80). There he gave Guthrie \$2000, keeping \$500 for himself once Guthrie had assured him "that he could get Mr. Goldberg to probably take a little less and go ahead and issue the bond." (Tr. 680; 798-99). Subsequent events demonstrate that Guthrie simply pocketed this money. (Tr. 348; 705; GX 3).*

At a second meeting at a restaurant near Guthrie's hotel, Guthrie and Cauble again assured Fucillo that his bond had been approved and, further, that Glass was coming to the restaurant in order to pick up Cauble so that they both could drive to Goldberg's home in Brooklyn "to get the bond." (Tr. 74; 682).** Thereafter, Glass joined them and, after more of these assurances to Fucillo, departed with Cauble. (Tr. 75; 291ff; 454-55; 682). A short time later, after Cauble and Glass had circled the block in order to allow Guthrie time to rid himself of Fucillo, Guthrie and his wife joined them for the journey to Goldberg's. (Tr. 293-95; 682ff).

Once at Goldberg's, Cauble and Glass learned what Guthrie already knew:*** that Goldberg had no bond for Fucillo—indeed, he hadn't even submitted the bond ap-

* In particular, Goldberg only received a total of \$950 for his work on the Fucillo transaction. (Tr. 348). This payment was made in late January 1976 from funds entirely different from the \$2500 given to Cauble on December 10th. (Tr. 348ff; 704-05; see also Tr. 1059).

** Prior to this meeting with Fucillo, Guthrie and Cauble had, in addition, "assured him... that the bond was forthcoming and had been approved" numerous times by telephone. (Tr. 688).

*** Guthrie, of course, was the contact between Goldberg and his other co-defendants and had conveyed numerous false assurances of Goldberg's ability to secure bonds to the others prior to this meeting. For example, it was Guthrie who had advised Cauble that Goldberg had Fucillo's bond and only needed \$2500 to pay for it.

plication or spoken with an underwriter. (Tr. 296-98; 683).

Such revelation, however, did not faze these swindlers in the least. Instead, Cauble simply joined Guthrie in thereafter telling Fucillo one outright falsehood and supplying one phony excuse after another. (Tr. 206; 687ff). Over the course of the next several weeks, Guthrie and Cauble told Fucillo that they had his bond;* that it was ready (GX 4); that it had been approved (Tr. 547; 551; 557; 564; 688ff); that it was sitting at the underwriter's office waiting to be picked up (GX 3); that the bond was available, but that its funding remained to be worked out (Tr. 542; 608ff; 700ff; GX 3); that Fucillo's bond had been obtained, but that certain additional letters were needed to commit funds for after January 1, 1976 (GX 4); or some other such excuse (*e.g.*, Tr. 76; 693);** all intentional lies by Guthrie and Cauble and designed for only one purpose: to appease Fucillo and lull him along. (Tr. 688ff).*** After a while, Silver and Glass also began to convey this sort of false information to Fucillo. (Tr. 75; 162; 604). As Fucillo testified, "each of them assured me that the bond would be had." (Tr. 76; 618).

During the latter weeks of December, Cauble went to St. Louis to further the ruse that a guarantee bond

* As Fucillo testified on cross-examination, Guthrie, Cauble and Silver all told him during the first three weeks in December that "they had my bond." (Tr. 162).

** Guthrie and Cauble similarly lied to Jack Smith. As Smith testified, Guthrie "had informed me that he...had been successful in obtaining a bond...and they were just waiting on the man [the underwriter] to sign the final documents." (Tr. 200; 202; 207-08; 211-15).

*** Cauble made this clear when he testified that it "was a daily event that we [himself and Guthrie] kept in contact with him [Fucillo] to keep him *calm* that his bond was forthcoming, so there was *no disruption* and *getting him excited* [emphasis added]." (Tr. 697).

for Fucillo actually existed. (Tr. 693ff).^{*} Then, both Guthrie and Cauble informed Fucillo that they were going to pick up his bond on Christmas Eve, (Tr. 76; 690), but all they really did was deliver some papers to an underwriter. (Tr. 689-90).^{**} Then, after Christmas, both Guthrie and Cauble told Fucillo that they *had his bond*. (Tr. 81; 698ff; 703-704; GX 3 and 4). As Fucillo testified, Guthrie "said that they had obtained the bond and that Dick Cauble was going to St. Louis [for a second time] for a funding of the bond." (Tr. 81). Representations to the contrary notwithstanding, of course, there was no bond, and both Guthrie and Cauble knew that there was no bond. (Tr. 697ff). As Guthrie said to Fucillo in one tape recorded telephone call, "he's [Cauble's] got the bond, but it's those letters he's trying to work out." (GX 4). Indeed, when told that Guthrie had his bond, Fucillo asked him for a copy, so that he could attempt to get it funded himself, and, as Fucillo testified, Guthrie "said that was a good idea, why don't you try. But I never did get a copy of the bond to try." (Tr. 85-86; 162-63).

This scheme to defraud Fucillo carried on well into the New Year with more lies and false promises. (*E.g.*, Tr. 106ff; 208ff; 344ff; 562ff; 703ff). As it progressed into January, Guthrie began to fade from the picture.

^{*} Cauble testified that twice in December 1975 (once before and once after Christmas) he traveled to St. Louis and discussed the possibility of funding Fucillo's bond with a Mr. Lumetta; however, these discussions came to naught because Guthrie never delivered any bond as he had promised. (Tr. 700; see also, *e.g.*, Tr. 333ff).

^{**} This fact notwithstanding, Guthrie and Cauble falsely informed Smith that they had secured Fucillo's bond and he, in turn, conveyed this false information to Fucillo on Christmas Day. (Tr. 81; 207).

(Tr. 214; 704; 709).^{*} By then, he had accomplished what he had set out to do, namely, exchange his false representations and empty promises for \$2000 in cash, knowing all the while that he never could produce and that there never was any financial guarantee bond for Fucillo. (Tr. 114-15; 564; 653).

B. The David Wilson Fraud (Counts 3-5)**

In November 1975, David Wilson, the owner of the Broward Convalescent Home, a nursing home located in Fort Lauderdale, Florida, needed rapid financial assistance—nearly \$800,000—in order to make an accelerated payment to the former owners of the nursing home and avoid its foreclosure. (Tr. 835ff). To that end, Wilson sought the assistance of co-defendant Frederic Wohlfeld, a broker in the Miami area and a former employee of Silver's (Tr. 511), with whom he had dealt several months earlier in an unsuccessful attempt to obtain other financing. (Tr. 836-37). Wohlfeld, in turn, forwarded Wilson's

^{*} For example, during the first week of January 1976, Guthrie instructed Cauble to call Fucillo and Smith, "as they were getting edgy" and advise them that he, Cauble, was at La Guardia Airport "already on [his] way to take the bond" to St. Louis for funding (a third St. Louis trip). (Tr. 703-04). To this, Cauble, who was ill at home, demurred and, instead, called Fucillo and Smith and told them "that Mr. Guthrie and myself had been lying to them about the bond . . . that we weren't able to get it and we hadn't been able to get ahold of the bond at all or had even seen it." (Tr. 704).

From this point forward, Guthrie was pretty much out of the picture. Cauble, however, picked up his mantle and "kept telling [Fucillo] . . . that it was momentary that we would have [his bond]. It was really approved. . . ." (Tr. 704).

^{**} In proving the fraud, the Government's direct case consisted of the testimony of co-defendants Glass (Tr. 276-500); Silver (Tr. 503-650); Cauble (Tr. 651-834); as well as, David Wilson (Tr. 835-67 and 888-918); and K.P. Jones (Tr. 919-56), and the exhibits accompanying their testimony.

financial problem to Silver in New York to see if a solution might be found. (Tr. 514).

When Silver received the Wilson loan request, he reviewed it with financier Guthrie. (Tr. 512ff). After doing so, Guthrie advised Silver that there would be no problem in providing an \$800,000 AMMIC bond to secure Wilson's needed loan. (Tr. 514). In addition, Guthrie provided Silver with a copy of a blank AMMIC bond form (GX 514-15; GX 30A) which could be used by Wilson in order to determine the viability of its funding. (Tr. 516).

Upon its receipt, Silver forwarded a copy of the form to Wohlfeld in Florida, and Wohlfeld, in turn, delivered it to Wilson, who took it to his local bank. (Tr. 516; 838). Although this bank informed him that "the bond was okay", it also advised Wilson that it did not make loans based on such surety bonds. (Tr. 838). Since he needed the money, Wilson decided to secure the guarantee bond anyway and, in the interim, seek out another funding institution. (Tr. 839).

To this end, on November 28, 1975, Wilson signed a contract with Wohlfeld and United Housing Corp., of which Silver was the principal (GX 30A), paid out \$5000 in advance-fees to Wohlfeld and Silver (GX 157A and B) and began to wait for an \$800,000 AMMIC bond, which was promised to be delivered by December 7th. (Tr. 516-18; 839-42; 922-93).

Meanwhile, in New York, Guthrie repeatedly promised Silver that Mr. Haynes of AMMIC would shortly arrive in New York to issue Wilson's bond. (Tr. 516; 518-20). Days passed, but Haynes never showed up;

instead of the bond, all Silver ever got was a series of excuses from Guthrie. (*Id.*). Finally, Guthrie advised Silver that Haynes wasn't coming to New York, but not to despair because another of his sources, Harry Goldberg, would write the bond. (Tr. 520).

Silver, in turn, met with Goldberg and, at the same time that Cauble presented the Fucillo package, Silver presented the Wilson deal to him. (Tr. 520-21; 711). Goldberg looked over the Wilson financial papers, said that a bond appeared "doable" and accepted the file for the processing of a bond. (Tr. 521).*

Around this same time, Wilson began calling Silver, Wohlfeld and Paul Heischuber, Silver's associate, to inquire about the progress of his bond. (Tr. 842-43; 924-26). In response to these inquiries, Wilson was told that "the bond was being worked on and it was being issued, there would be no problem in having it issued." (Tr. 525; 843).

On December 5th, Silver departed for Europe, after being assured by Guthrie that Goldberg would issue Wilson's bond. (Tr. 522; 525). In the meantime, the contractual deadline of December 7th passed and Wilson and his lawyer, K. P. Jones, went to New York on December 10th in an attempt to determine the true status of the bond. (Tr. 850-51; 926). To that end, on December 11th, they went first to Silver's office, where they were told that

* In response to cross-examination concerning his expending Wilson's advance-fee, Silver summarized these events as follows: "I expected the bond originally from American Manufacturers to be written within two or three days after receiving the money, and then after American Manufacturers was no longer available, I was impressed by the fact, by Mr. Guthrie, that the bond would therefore be written by Mr. Goldberg.

. . . I did use the money, but, I was under the impression that the bond would be written and was about to be." (Tr. 645).

Silver was in Europe and that they should proceed to the offices of Glass & Glass—the supposed escrow agent for Wilson's bond. (Tr. 852; 927). When Wilson and Jones arrived at the Glass & Glass law offices, Guthrie, Cauble and Glass proceeded to advise them, first, that AMMIC would not be writing their bond (as called for in the November 28th contract) and, second, that Harry Goldberg would write the bond right away, the next day. (Tr. 350ff; 359; 712; 853ff; 917; 929ff). As Wilson testified, "they informed me at the time that I would have the bond issued right away. There would be no problem with it." (Tr. 855). Guthrie and Cauble knew this representation to be false because they had met with Harry Goldberg the night before and knew that he hadn't as yet even submitted the bond applications to an underwriter. *Supra*, p. 10-11.

That night, Wilson, Jones, Cauble, and Guthrie, went out for a night on the town, and, as Cauble testified, "both Mr. Guthrie and myself assured [Wilson] that a bond would be forthcoming the next day". (Tr. 713; 712-14; 856-57; 932-35). As Wilson described these events "It was a celebration dinner. We were celebrating getting the bond, having it over with, and going to our closing." (Tr. 857).*

Friday morning, Wohlfeld, arriving from Florida, went to Wilson's and Jones' hotel room and asked for an additional \$5000 in cash as a pay-off for the bonding agent. (Tr. 858; 936). Wilson and Jones at first declined to make such a payment. (Tr. 858-59; 936). Later that morning, however, after being assured by Glass that Wilson's bond was, indeed, forthcoming, Wilson arranged

* During the course of this evening, Jones stated to Guthrie that he "must really have something on the bonding agent to get him to write a bond like this." (Tr. 935). Guthrie, in turn, "smiled" and said "I do." (Tr. 935).

to have \$5000 transferred by wire from his bank in Florida to Glass' account in New York. (Tr. 362; 859; 936-37; GX 31; 157D).

Once this transfer had been effected, Wilson and Jones returned to the Glass offices. (Tr. 364). At this time, they were falsely assured by Guthrie, Cauble, and Glass that the bond would be written that day. (Tr. 364-66; 489; 714-15; 816). Wilson and Jones left for Philadelphia to prepare for an escrow closing of the bond on Saturday.* Glass, after learning from Guthrie that Wilson's bond would be immediately available, gave Cauble the keys to his automobile and instructed him to go to Goldberg's office in Valley Stream and pick it up. (Tr. 364-66; 715; 862; 939-40). Guthrie, knowing there was no bond, called Goldberg's office and then falsely reported to Cauble that Goldberg had gone home and, therefore, that the bond could not be secured until the following Monday. (Tr. 715-16; cf. Tr. 366). The next day, when Jones called Glass from Philadelphia, he was told that no closing could be held until the following week. (Tr. 717; 942). With this, Wilson and Jones departed Philadelphia for their homes in Florida. (Tr. 942-43). On Sunday, Jones spoke with Cauble and was told that the bond would definitely be secured on Monday and that he and Wilson should return to Vineland, New Jersey, for a closing at their bank on Tuesday. (Tr. 717; 943).

Wilson and Jones then returned to Philadelphia on Monday and from there proceeded to Vineland, New Jersey. (Tr. 943). After waiting for the bond to arrive and not getting it, they made numerous telephone calls to various people in New York, including Guthrie, and

* Wilson and Jones had arranged through a third party to have their bond funded, once issued, by a bank in Vineland, New Jersey; this, of course, never came to pass. (Tr. 862-63).

they were again falsely assured that everything was fine—that the bond would be forthcoming—and that just some technicality remained to be arranged. (Tr. 371; 717; 865-66; 944; GX 36B and 36D).^{*} As Wilson testified, Guthrie told him that “The bond will be ready at any moment; they are going to pick it up; no problem. . . .” (Tr. 866). But, as Wilson also testified, despite such assurances, “No one showed up [with the bond].” (Tr. 866; 888).

In these conversations that Wilson and Jones had from Vineland, Guthrie told what was, perhaps, the most brazen of all his many lies: he told Jones that Wilson’s bond “had been issued” and that Cauble had it “in the car”. (Tr. 944-45).^{**} Cauble, of course, testified that he never had any bonds, much less drove a car in New York City. (Tr. 719-20).

^{*} As Cauble testified, both he and Guthrie falsely assured Wilson that the bond was forthcoming at a time when they knew there was no bond. (Tr. 717-18).

^{**} As Jones testified at trial, after having waited all day Tuesday for the bond to be delivered, he spoke with Guthrie that night and:

“Mr. Guthrie told me that there was no problem, the bond had been issued and it was ready to go. . . . At that time Mr. Guthrie told me the bond was issued. I said fine. I want the name of the company, I want the number of the bond, and I want the name of the bonding agent and his phone number so that we can call him in the morning to make verification on it and call the company, the insurance company, to verify that it was a legitimate bond. All of these things were required by the Vineland Bank, of course, before they would fund the commitment.

Mr. Guthrie said, “No problem, it’s in the car and Dick Cauble is parking the car.” He said, “Say, wait a minute, I can’t stay on this phone any longer. Let me get to another phone and I’ll call you back with the name and number of the bond and all the rest of that information.” He hung up.” (Tr. 944-45).

Wilson and Jones returned to New York on December 17, 1975, no bond having been delivered to them in Vine-land, and met with Glass who, after talking with Gold-berg, told them that there was no bond. (Tr. 373; 888-89; 946-47). At this point, Glass gave a \$5000 check to Wil-son as a refund for the wire transfer (Tr. 3.3; 889; 947; GX 30C); he subsequently, after discussing this matter with Guthrie and Cauble, stopped the payment of it. (Tr. 376; 719; 892).

Later on that day, after unsuccessfully waiting to see Silver, Jones and Wilson met with Guthrie at his hotel. (Tr. 890; 947-48). Guthrie falsely promised Wilson that he could get him a \$200,000 bond *at that time*,* but Wilson, who desperately needed \$800,000, declined. (Tr. 871; 948-49; cf., Tr. 536ff).

In the end, Wilson and Jones went home to Florida. (Tr. 891). They never obtained any bond. (Tr. 893; 950). They never obtained any part of the \$10,000 advance-fee back. (Tr. 893; 950).**

The Defendant's Case

Guthrie presented no evidence on his own behalf.

* A comparison of the post-December 17th conduct of Guthrie in the Fucillo affair, *supra*, alone shows the falsity of this claim.

** In addition to the foregoing proof concerning the Fucillo and Wilson frauds, and the much more like it which is of record, the Government also introduced, on its direct case, proof of a prior similar act by Guthrie, which is discussed at Point II hereof.

ARGUMENT

POINT I

The Evidence Of Guthrie's Guilt Was More Than Sufficient to Sustain His Conviction.

Positing a "smoking gun" standard (App. Br. 37), Guthrie argues that the evidence at trial was insufficient to prove that he acted with the requisite criminal intent. This claim is totally frivolous. Given the settled rule that on appeal the evidence must be viewed in the light most favorable to the Government,* with full weight accorded to "the right of the jury to determine issues of credibility, weigh the evidence, and draw reasonable inferences of fact",** the evidence presented at trial overwhelmingly demonstrated Guthrie's guilt.***

* *Glasser v. United States*, 315 U.S. 60 (1942).

** *United States v. Greenberg*, 534 F.2d 523, 524 (2d Cir. *per curiam*), *cert. denied*, 429 U.S. 831 (1976). See also *United States v. Hawley*, 554 F.2d 50, 52 (2d Cir. 1977); *United States v. Taylor*, 464 F.2d 240 (2d Cir. 1972).

*** The jury question was presented, on the facts of this case, is clear. As this Court recognized in *United States v. Armantrout*, 411 F.2d 60, 66 (2d Cir. 1969): "In cases of alleged commercial fraud of this type, resort must always be had to an objective approach. Naturally appellants will always disclaim fraudulent intent. Therefore, it must be the *exclusive function of the jury* to form its own conclusion after examining and appraising the evidence" [emphasis supplied]. Accord, *United States v. Amrep Corp.*, Dkt. No. 77-1150, slip op. 5157 (2d Cir., Aug. 8, 1977), a decision which clearly indicates that, on facts such as these, a jury question is presented. The Court there said (slip op. at 5165):

"It is often difficult to prove fraudulent intent by direct evidence, and it must be inferred from a pattern of conduct or a series of acts 'rather aptly designated as badges of fraud.' [Citation omitted]. There was evidence that each of the . . . defendants knew or could have known by the exercise of reasonable diligence that the statements made to prospective purchasers were false, and the issue of his bad faith was therefore for the jury."

[Footnote continued on following page]

The proof developed at trial clearly showed that Guthrie had both orchestrated and actively participated in the Fucillo and Wilson frauds in each of three ways.* First, it was Guthrie who falsely informed his co-defendants that he could readily obtain "financial guarantee" insurance bonds, from one of three sources, to secure the victims' needed loans. Based on receiving such assurances from Guthrie, these co-defendants, aided by the false statements of Guthrie himself, induced the payment of initial advance-fees from the victims. Second, Guthrie himself falsely assured the victims that their bonds would rapidly be available. Based on these further assurances, the victims parted with additional advance-fees; *e.g.*,

See also *United States v. Curtis*, 537 F.2d 1091, 1097 (10th Cir.), *cert. denied*, 97 S.Ct. 389 (1973) ("The question of good faith, success of the venture, and fraud is for the jury. Intent may be inferred from conduct and circumstantial evidence, upon which reasonable inferences may be based."); *United States v. Porter*, 441 F.2d 1204, 1210 (8th Cir.), *cert. denied*, 404 U.S. 911 (1971); *United States v. Lichota*, 351 F.2d 81, 89-90 (6th Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966); *Gusow v. United States*, 347 F.2d 755, 759-60 (10th Cir.), *cert. denied*, 382 U.S. 906 (1965); *Henderson v. United States*, 202 F.2d 400, 403 (6th Cir. 1953).

*Guthrie complains (App. Br. 26-27) that, in its opening statement, the Government painted Guthrie to be the ringleader of these frauds and then failed to prove it. This is frivolous. Apart from the obvious answer that even had the Government failed to prove Guthrie's leadership role it would not have mattered on the question of his guilt or innocence, the simple answer is that the proof clearly showed this defendant to be the mastermind behind these fraudulent schemes. Without restating the facts here, it is clear that these frauds could not have been conducted without Guthrie, if for no other reason than because he was the only individual who purported to be in contact with both the bonding companies, Goldberg, AMMIC and Sentry, and his other co-defendants. In addition, the proof clearly established that Guthrie had assembled the various participants in these frauds, directed their movements, and, in addition, had himself made numerous false statements to the victims.

\$2500 from Fucillo and \$5000 from Wilson.* Third, once the victims had paid these advance-fees, Guthrie wilfully and repeatedly falsified the availability of their bonds—indeed, going so far as to advise each of them, at one time or another, that he had secured the bonds that they had been promised.**

Notwithstanding the overwhelming character of this proof, the defendant advances here a number of groundless arguments, most of which were made to and, by their verdict, rejected by the jury. Principal among these are the arguments that: (1) there was no evidence of untrue statements by Guthrie prior to the victims' payment of

* As Judge Learned Hand said long ago, such false representations are condemned simply because, having been made, a victim "has lost his chance to bargain with the facts before him. That is the evil against which the statute is directed." *United States v. Rowe*, 56 F.2d 747, 749 (2d Cir.), *cert. denied*, 286 U.S. 554 (1932).

** Guthrie concedes, in his brief, that "the evidence proved him a liar." (App. Br. 28). However, he further strongly argues that because all of his lies supposedly occurred after the payment of the advance-fees (a statement far contrary to the facts), he is somehow immunized from guilt. This, most certainly, is not the law. Rather, even accepting his argument *arguendo*, the lies that Guthrie told to his victims, *e.g.*, his false statements to Jones that Wilson's bond was out in the car, are clearly attributable to these illegal schemes because they "were designed to lull the victims into a false sense of security, postpone their ultimate complaint to the authorities, and therefore make the apprehension of...[Guthrie] less likely than... had [they not] taken place." *United States v. Maze*, 414 U.S. 395, 403 (1974). Accord *United States v. Amrep Corp.*, 545 F.2d 797, 800 (2d Cir. 1976); *United States v. Pollack*, 534 F.2d 964, 972 (D.C. Cir.) (Lumbard, C.J.), *cert. denied*, 429 U.S. 924 (1976); *United States v. Marando*, 504 F.2d 126, 130 (2d Cir.), *cert. denied*, 419 U.S. 1000 (1974); *United States v. Eskow*, 422 F.2d 1060, 1069 (2d Cir.), *cert. denied*, 398 U.S. 959 (1970); *United States v. Painter*, 314 F.2d 939, 943 (4th Cir.), *cert. denied*, 374 U.S. 831 (1963); *Wiltesy v. United States*, 222 F.2d 600, 601 (4th Cir. 1955). Thus, even had the jury relied only on such post payment lies by Guthrie, the verdict would nonetheless have been proper.

any of the advance-fees; (2) people "lie all the time to buy time and to stall annoying clients" (App. Br. 29), but that such conduct "is not criminal" (*id.*); (3) the "good faith" and "efforts" of his co-defendants should inure to Guthrie's benefit; (4) the Government's case "depended on showing the appellant did not intend to obtain bonds" (App. Br. 30); and (5) in his instructions to the jury, Judge Bonsal "assumed that the difficult factual issues had been resolved against" Guthrie. (App. Br. 35).^{*} Each of these arguments is meritless because,

^{*}The last two of these arguments can briefly be discussed here. Contrary to Guthrie's assertion (App. Br. 30), the Government's case did not "depend on showing the appellant did not intend to obtain bonds," which is irrelevant; rather, the Government's case showed that Guthrie made false representations and promises to his victims concerning his ability to secure immediately available bonds in order to get and keep their money. Such a showing is all that is required under 18 U.S.C. § 1343 because, as Judge Learned Hand explained:

"it is a fraud if the promisor knows that he will not perform, for a promise is an expression of present intent, and a present intent is a fact. Furthermore, it is not necessary to prove that the promisor intended not to perform; it is enough if he had no intention at all on the matter, or if he had no belief whether or not he could perform. . . ."

Knickerbocker Merchandising Co. v. United States, 13 F.2d 544, 545, 546 (2d Cir.), *cert. denied*, 273 U.S. 729 (1926). Here, the proof quite clearly showed that Guthrie made numerous promises concerning his and his co-defendants' ability to secure these bonds for which he had no basis. See also *Barnard v. United States*, 16 F.2d 451, 452-53 (9th Cir. 1926), *cert. denied*, 274 U.S. 736 (1927).

Similarly, by isolating three sentences, taken out of context, from the entirety of Judge Bonsal's instructions to the jury, Guthrie argues that he was prejudiced because the trial judge had "resolved" the difficult factual issues against him. (App. Br. 35). Nothing is further from the truth and it need only be noted that the trial court's charge, construed as a whole, fairly presented the issues in this case for consideration by the jury. See, e.g., *United States v. Birnbaum*, 373 F.2d 250, 262 (2d Cir.), *cert. denied*, 389 U.S. 837 (1967); *United States v. Andreadis*, 366 F.2d 423, 434 (2d Cir. 1966), *cert. denied*, 385 U.S. 1001 (1967); accord *Cupp v. Naughten*, 414 U.S. 141 (1973).

as Judge Lumbard recently observed, these arguments were "rejected by the jury, and the verdict was amply supported by the record." *United States v. Cavallaro*, 533 F.2d 300, 303 (2d Cir. 1977).

The evidence quite clearly showed Guthrie to have made numerous false statements * prior to the payment of all of the advance-fees. Without attempting here to summarize all such false claims and assurances by Guthrie, we note but several: first, in connection with the Fucillo fraud, Guthrie represented an ability to secure bonds from three sources, an ability relied on by Cauble and Silver to secure initial fees from Fucillo and which the proof showed to be non-existent; he advised Cauble, prior to Fucillo's payment of the first advance-fee, that Goldberg was prepared to issue a bond; he stated to Jack Smith on December 8th that he could secure a bond within 24 hours; he stated to Fucillo on December 9th that his bond would be rapidly obtained; and, perhaps, most importantly, he stated to Cauble on December 10th that Fucillo's bond was ready and only a \$2500 cash payment prevented its delivery. Similarly, in connection with the Wilson fraud, Guthrie represented to Silver that an AMMIC bond for Wilson presented no problem, a claim that caused Silver to induce the payment of an initial advance-fee and on which Guthrie could not make good;

* "[I]t has been the law ever since 1896, that to promise what one does not mean to perform, or to declare an opinion as to future events which one does not hold, is a fraud." *United States v. Grayson*, 166 F.2d 863, 866 (2d Cir. 1948) [footnote deleted and emphasis added]. Clearly, Guthrie's statements, both to the victims and others, prior to the payment of these fees (as well as after), fall within the ambit of this prohibition. In addition, " 'Fraudulent representations', [as used in the statute], may be effected by deceitful statements of half truths or the concealment of material facts", *Williams v. United States*, 368 F.2d 972, 975 (10th Cir. 1966), cert. denied, 386 U.S. 997 (1967), and Guthrie's claims fall under this rubric, as well. See also *United States v. Amrep Corp.*, supra, slip op. at 5165.

he claimed that Goldberg would write this bond; he promised to both his co-defendants, and Wilson and Jones the immediate availability of the needed bond which induced Wilson's second \$5000 payment.* In short, in now advancing this argument, Guthrie fails to perceive the thrust of the Government's proof which, quite simply, was that Guthrie, at first, lied to his confederates in order to cause them to secure initial fees from the victims based on his false claims and then, both directly and through his cohorts, continued to move these frauds forward through a constant stream of falsehoods to the victims themselves.**

* Guthrie appears to argue that his presence while false statements were being made to the victims, but his failure to engage personally in such lying, relieves him of liability. This is both logically and factually inaccurate. Statements made in his presence, which he knew (or should have known) to be false and which he did not correct, are equivalent to his own false statements. See, e.g., *United States v. Eucker*, 532 F.2d 249, 254-55 (2d Cir. 1976); McCormick, *Evidence* § 270, 651-52 (2 ed. 1972). More importantly, the proof showed Guthrie to have been an active participant in all such meetings, either by direct statements to the victims or by advising his co-defendants as to what to say.

** Moreover, the law is clear that the continued repetition of a statement once believed true, but which has subsequently become false and is known to be false, "is enough to constitute a 'scheme to defraud.'" *United States v. Dilliard*, 101 F.2d 829, 834 (2d Cir. 1938), *cert. denied*, 306 U.S. 635 (1939). Thus, for example, even if, *arguendo*, Guthrie believed that Goldberg had a bond for Fucillo when the \$2500 was secured from him, when Guthrie found out that night that there was no bond and he thereafter continued to represent that one existed, he became chargeable for the fraud.

In addition, as the proof showed, numerous false statements by Guthrie, both before and after the payment of fees by his victims, bore strongly on the question of his intent. See *United States v. Arnold*, 543 F.2d 1224, 1226 (8th Cir. 1976), *cert. denied*, 97 S.Ct. 765 (1977) ("One of the salient factors in weighing the sufficiency of the proof as to intent to defraud is

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Guthrie next unashamedly contends, as he did in the trial court, that this is a case about "the American way of doing business" (Tr. 1101), namely, that lying to buy time and stall annoying clients is an appropriate method of conducting one's affairs. This claim was rejected by the jury and clearly is not available to appellant now. Indeed, this Court has previously condemned just this sort of argument, declaring even "'white lies' repugnant to 'standards of business morality'".* Quite simply, the numerous and repeated lies told by Guthrie and his confederates to their victims concerning the supposed immediate availability and, indeed, the actual attainment of the bonds, far transcended "the proper limits of the exaggerating enthusiasm of the normal salesman,

the party's use of material misrepresentations in carrying out the venture."); *United States v. Porter, supra*, 441 F.2d at 1210; *United States v. Goldberg*, 401 F.2d 644, 647 (2d Cir. 1968), *cert. denied*, 393 U.S. 1099 (1969) ("The indicia of fraud . . . [include] . . . flagrant, oral misrepresentations."); *Wall v. United States*, 384 F.2d 758, 762 (10th Cir. 1967); *United States v. Andreadis, supra*.

* *United States v. Regent Office Supply Co.*, 421 F.2d 1174, 1179 (2d Cir. 1970).

As the Court there declared:

"We do not...condone the deceitfulness such business practices represent nor do we approve the cynical view advanced in defendants' rhetorical flourishes that such blatant dishonesty should be encouraged by reason of its 'social utility' and 'social necessity * * * in keeping with the most praiseworthy standards of business morality and worthy competitive enterprise.' We do not find the practices defended by counsel to be 'innocuous' or conduct 'which at worst may evoke in the breast of the perfectionistic moral idealist a sense of reproach towards the imperfections of man's soul during the mortal span.' On the contrary, we find these 'white lies' repugnant to 'standards of business morality.'" (*Id.*)

or the mistaken judgment of the honest man, as to impress them with the badge or mark of fraud." *

Guthrie also seeks to avoid responsibility for defrauding Fucillo and Wilson by hiding behind the self-serving statements and irrelevant conduct of his co-defendants. Thus, defendant argues that because Glass, Silver and Cauble testified to having acted, at least in some part, in "good faith" during these transactions, such self-serving declarations should now benefit him.** Similarly,

* *Holmes v. United States*, 134 F.2d 125, 133 (8th Cir.), cert. denied, 319 U.S. 776 (1943). Accord *Lustiger v. United States*, 386 F.2d 132, 138 (9th Cir. 1967), cert. denied, 390 U.S. 951 (1968); *Blachly v. United States*, 380 F.2d 665, 671 (5th Cir. 1967); *United States v. Hopkins*, 357 F.2d 14, 19 (6th Cir.), cert. denied, 385 U.S. 858 (1966) ("This case does not present an example of salesman's 'puffing' regarding a product sold and delivered, but rather reflects the receipt of money on a promise of delivery and a failure to meet that promise. Whether such failure was as a result of honest inability to fully perform, being only a civil breach of contract, or was a premeditated fraudulent scheme . . . was for the jury to decide, and they have done so." [Emphasis supplied].) In light of the foregoing statement, we need say no more concerning Guthrie's mischaracterization "that the prosecutor's theory of the case was that breach of contract equals criminal intent." (App. Br. 35).

** This argument ignores two simple facts. First, despite such protestations of good faith, each of these defendants had previously pled guilty. Second, it is, indeed, possible that these defendants, at least for a while, were as much Guthrie's dupes as were Fucillo and Wilson and, acting in reliance on what Guthrie had told them, believed themselves to be acting in good faith. (See, e.g., Tr. 988). Of course, such beliefs entertained by these co-defendants do not excuse Guthrie's conduct because it was his false claims that both led to these erroneous beliefs and, in the end, caused the co-defendants to join in these schemes. Cf., *United States v. Amrep Corp.*, supra, slip op. at 5165 (attribution of salesman's statements to officers). Of course, one who knowingly joins a scheme, after having first been duped into participating in it, is just as guilty as is Guthrie, who intended

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pointing to a number of isolated events during the conduct of these schemes,* which are alleged to show good faith on the part of his co-defendants, Guthrie contends that his intent to defraud was not established. The short answer to this argument is that such "good faith" was argued by Guthrie to the jury (Tr. 1102ff), and rejected by them after Judge Bonsal had fairly submitted the relevant question of *Guthrie's* good faith, and not the irrelevant one concerning that of his confederates, for their consideration. (Tr. 1135).

Moreover, while such purported "good faith" evidence, no matter how farfetched, could have been accepted by the jury, if it so chose, it was not obligated to do so for two other significant reasons. First, as has been pointed out, the jury could equally have found that

these frauds from the outset. See *Van Riper v. United States*, 13 F.2d 961, 964 (2d Cir.), *cert. denied*, 273 U.S. 702 (1926); See also *United States v. Amrep Corp.*, *supra*, slip op. at 5166; *United States v. Finkelstein*, 526 F.2d 517, 527 (2d Cir. 1975), *cert. denied*, 425 U.S. 960 (1976): "While Finkelstein may have been on the periphery at the outset . . . he quickly became accustomed to his new-found responsibilities. . . . It is irrelevant that he may not have been a party to the formation of the scheme."

* For example, Guthrie argues that because these defendants stood to gain a larger fee when these deals closed, there was no fraud. Were this the case, then an advance-fee scheme could never be illegal. The simple answer is that Guthrie never intended to realize these further fees but, instead, simply intended to fleece his victims quickly and never deliver any of the promised financing.

Another such example given by Guthrie is the claim that Goldberg's refusal to reveal the name of the insurance company during the meeting at his home, somehow shows "good faith". Nothing could be further from the truth because, as the proof showed—indeed, as defendant clearly points out in Point III of his brief—Goldberg did not reveal this information because of Guthrie's prior conduct in misusing another of Goldberg's insurance carriers, thus prompting Goldberg's desire for secrecy in these transactions in order to prevent a repetition of this same sort of misconduct by Guthrie. (Tr. 686).

Guthrie had, by his actions, effectively duped his co-defendants into believing that they were acting in "good faith", only later realizing that their words and conduct had been and were being used to fleece Fucillo and Wilson. Such a finding by the jury would, of course, in no way extricate Guthrie from his guilt. See *United States v. Cohen*, 145 F.2d 82, 88 (2d Cir. 1944), *cert. denied*, 323 U.S. 799 (1945).^{*} Second, even if the plan proceeded from a wholly legitimate motive, the record here is so replete with evidence of deliberately false statements concerning the promised bonds, demonstrating a generally fraudulent purpose, that any initial legitimacy was more than overcome. *United States v. Farago*, 283 F.2d 772, 773 (2d Cir. 1960). As Judge Sobeloff so clearly stated in *United States v. Painter*, *supra*, 314 F.2d at 943:

"[N]o amount of honest belief that [their] . . . enterprise would eventually succeed can excuse the willful misrepresentations by which the investors' funds were obtained. An investor may be defrauded if his reliance is induced by deliberately false statements of fact, and the defendant[s]' optimism as to the future is no defense."**

^{*} See also *United States v. Finkelstein*, *supra*, 526 F.2d at 521-22: "The consummation of each particular fraudulent transaction . . . was dependent upon the successful exploitation of the illusion of legitimate . . . activity . . . That certain defendants were eager to cheat each other for a large slice of the spoils does not obscure the unifying means used by all of them to defraud the public in the first place." (Emphasis supplied).

^{**} *Accord*, *United States v. Amrep Corp.*, *supra*, slip op. at 5166 ("Self-delusion, even if existent, does not justify baseless representations.") and at 5168 ("...belief in the ultimate success of [the venture] would not excuse [the defendants'] fraud-

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Thus, any actions or other conduct which his co-defendants allegedly engaged in during these transactions, were at best, evidence in support of Guthrie's claimed "good faith" that the jury was free to accept or reject.

In sum, in light of the numerous and repeated false promises, claims and representations that Guthrie made to his victims throughout the course of these transactions, it "stretches the imagination to suppose that appellant created a legitimate business organization. . . ." *United States v. Cohen*, 516 F.2d 1358, 1362 (8th Cir. 1975; per Mr. Justice Clark). Rather, the jury was presented with overwhelming evidence of the schemes charged and quite properly concluded that Guthrie had acted to defraud Fucillo and Wilson with the requisite criminal intent.*

ulent actions"); *United States v. Mackay*, 491 F.2d 616, 620 (10th Cir. 1973), *cert. denied*, 416 U.S. 972 (1974); *United States v. Diamond*, 430 F.2d 688, 691-92 (5th Cir. 1970); *Sparrow v. United States*, 402 F.2d 826, 828 (10th Cir. 1968); *Gusow v. United States*, *supra*, 347 F.2d at 759-60 (semble); *Deaver v. United States*, 155 F.2d 740, 744 (D.C. Cir.), *cert. denied*, 329 U.S. 766 (1946); *Hawley v. United States*, 133 F.2d 966, 970 (10th Cir. 1943) (jury question); *Foshay v. United States*, 68 F.2d 205, 210 (8th Cir. 1933), *cert. denied*, 291 U.S. 674 (1934); *Knickerbocker Merchandising Co. v. United States*, *supra*, 13 F.2d at 546; *Van Riper v. United States*, *supra*, 13 F.2d at 964.

* As the proof clearly reveals sufficient evidence for the jury's verdict, we do not add any discussion of the proof of the similar act as bearing on defendant's intent. Needless to say, such properly admitted proof (discussed in Point II hereof) further supported the verdict.

POINT II**Guthrie's 1976 Fraud Conviction Was Properly Introduced Into Evidence and the Trial Judge Appropriately Cautioned the Jury Concerning Its Use.**

Following the presentation of the testimony, but before the Government concluded its direct case, the trial judge permitted the following stipulation to be read to the jury:

"It is hereby stipulated and agreed by and between the government and the defendant that the defendant was convicted on January 19, 1976, after trial in December of 1975, in the United States District Court for the Central District of California, of the crimes of conspiracy in violation of Title 18, United States Code, Section 371, interstate transportation of stolen property, in violation of Title 18, United States Code, Section 2314, aiding and abetting in violation of Title 18, United States Code, Section 2; and that said conviction is presently on appeal." (Tr. 972).*

Immediately after this stipulation was read, Judge Bonsal appropriately cautioned the jury concerning its use, stating "[m]y only purpose in admitting this evidence . . . is so that you can consider it not on the guilt or innocence of the defendant of the crimes here charged, but on the issue of knowledge and intent of the defendant in the actions of this trial. That's the only purpose I am re-

* This stipulation embraced all of the relevant facts contained in the judgment of conviction entered against Guthrie in the Central District of California (as well as the fact that this conviction was on appeal) and thus must be considered as the functional equivalent of the jury's having heard the judgment itself read to them.

ceiving this evidence." (Tr. 973). This cautionary instruction was, thereafter, repeated by the district court in its charge. (Tr. 1136).

On this appeal, Guthrie raises a number of arguments directed to the admission of this evidence, as well as to the sufficiency of the trial court's cautionary instructions. Thus, Guthrie contends (App. Br. 38-52), that evidence of this 1976 conviction should not have been admitted because: it did not result from conduct sufficiently similar to the case on trial to warrant an inference of criminal intent by the jury; even if similar, this similarity was not made known to the jury by means of the above stipulation; and he was "railroaded" in entering into this stipulation. In addition, he asserts that the trial judge's instructions to the jury concerning this similar act proof constituted plain error. Each of these contentions is without merit.

Precisely at the same time that he was committing the frauds charged in the instant case, Guthrie was on trial in the United States District Court for the Central District of California on charges resulting from a similar swindle committed by him during 1974.* Indeed, on

* Indictment No. Cr. 75-637 (C.D. Cal.), filed on April 24, 1975, charged Guthrie and seven co-defendants with both conspiracy and a number of substantive offenses. A copy of this Indictment was annexed to the Government's Memorandum of Law and Offer of Proof Concerning Similar Acts [hereinafter "Government's Similar Act Memorandum"], which was filed in the District Court and served on defense counsel on November 4, 1976. Since Judge Bonsal considered the contents of this Indictment in reaching his decision to admit this evidence (Tr. 870; 876), and because of Guthrie's erroneous claim both here and to the jury at trial that Guthrie's prior conduct "wasn't a fraud case to begin with" (Tr. 1105), we set out this indictment here in some detail.

[Footnote continued on following page]

Count One of the California Indictment charged Guthrie and his co-defendants with a conspiracy to violate 18 U.S.C. §§ 656, 1005, 1343, 2314 and 2315 and alleged that:

"7. It was part of said conspiracy that *the defendants would and did engage in a continuous scheme to defraud and steal hundreds of thousands of dollars from financial institutions and investors.*

8. It was a further part of said conspiracy that *the defendant would conceal and attempt to conceal the misapplication and conversion of nearly one million dollars obtained in their scheme, by channeling it into and through bank accounts of the defendant STEIN.*

9. It was part of said conspiracy that for the purpose of executing their scheme to defraud and in order to deceive investors, the defendants and their co-conspirators would and did create an assemblage of sham corporations. . .

* * * * *

10. It was a part of said conspiracy that the defendants and their co-conspirators, using their sham companies, *would fraudulently offer to sell millions of tons of sugar and other commodities and to provide insurance guaranteeing their performance to various investors in the United States and elsewhere.*

* * * * *

13. It was part of said conspiracy that the defendants would and did wrongfully obtain and steal one million dollars from Aeris S.A., (a Swiss company) and the Baxter-Kelly Group *by making numerous . . . fraudulent representations, in written contracts and orally. . . .*

* * * * *

14. It was a further part of said conspiracy that *the defendants would cause a letter to be prepared to the effect that Aeris would receive a bond and be paid \$11,400,000.00 if the defendants' company failed to perform the contract.*

15. It was a further part of said conspiracy that *the defendants would and did give Aeris S.A. a document which purported to be an \$11,400,000.00 bond issued by the Ohio Casualty Insurance Company.*

16. It was a further part of said conspiracy that the defendants concealed and omitted to disclose that:

a. *The letter of commitment guaranteeing the insurance of a bond and a payment to Aeris S.A. of \$11,*

[Footnote continued on following page]

December 11, 1975, the same day that Guthrie was in New York to fleece Wilson and Jones, see p. 15-16, *supra*, the California jury, in his absence, found him guilty of the crimes set out in the above stipulation. Thereafter, on January 19, 1976, United States District Judge E. Avery Crary sentenced Guthrie to 18 months imprisonment concurrently on all counts of which he had been found guilty.

Two weeks prior to trial of the instant case, the Government made the following uncontroverted offer of proof concerning Guthrie's earlier conviction:

"The first similar act which the Government proposes to introduce against defendant Guthrie involves a fraudulent scheme for which Guthrie and

400,000.00 was fraudulently prepared by a co-conspirator who received a cash payment from the defendants.
b. The \$11,400,000.00 Ohio Casualty Insurance Company bond furnished to Aeris was a forged and materially altered document, prepared by the defendants and their co-conspirators in the law office of the defendant STEIN.

OVERT ACTS

* * * * *

13. On or about the evening of September 25, 1974, between the hours of 9 and 11 p.m., a document purporting to be an Ohio Casualty Insurance Company bond for \$11,400,000.00 was prepared by the defendants STEIN, GUTHRIE and a co-conspirator at the law office of the defendant STEIN, in Santa Ana, California."

Indictment No. CR. 75-637 (C.D. Cal.) (emphasis supplied, Clearly, the gist of this conspiracy was the devising of a scheme to defraud investors of over \$1 million by means of false representations and promises, including false claims and statements concerning insurance guarantee bonds. Similarly, Guthrie was charged in three substantive counts (Counts 10-12) with unlawfully, knowingly, wilfully "*and with fraudulent intent*", transporting in interstate commerce securities which had been stolen, converted and taken by fraud, in violation of 18 U.S.C. § 2314.

several co-defendants were recently convicted in a California federal court . . . and is quite similar to the fraud alleged in this Indictment, since it depended upon false and fraudulent representations as to the procurement of financial guarantees needed for the victim's financing. In briefest detail, Guthrie and his confederates falsely held out that they were substantial financial brokers who could obtain a 'financial guarantee bond' from a major insurance company that could be used to secure purchases and investments that the victims were urged to make. Guthrie and his cohorts even produced the alleged 'bond', which was fraudulent. By this scheme, Guthrie and his confederates induced the victims to transfer to them hundreds of thousands of dollars.

Indeed . . . as part of the California scheme, Guthrie procured a fraudulent 'guarantee' bond and, when one of his confederates was asked about this bond, the confederate claimed that it was in Guthrie's briefcase. When asked further about the number and other specifics of this bond, the confederate said that he didn't know anything because Guthrie wouldn't tell him. Eventually, Guthrie filled in a phony number on this fraudulent bond and the deal went forward. In the instant case, the proof will show that Guthrie employed the same trick. At one point, K. P. Jones (Wilson's attorney) called Guthrie and asked where Wilson's bond was. Guthrie replied that he had it, whereupon Jones asked for the bond number (the key to check out the legitimacy of the bond). Guthrie, learning from experience, replied that the bond was in Cauble's briefcase and that Cauble was off parking his car. Guthrie told Jones that he would call him back, which he never did, because here, unlike in California,

Guthrie had no bond, not even a fraudulent one." *
Government's Similar Act Memorandum at 5-6.

Notwithstanding the Government's offer in advance of trial, the issue concerning the admissibility of this similar act was next raised on the day before the Government was to rest, when the Government again reiterated its intention to offer evidence of the California swindle. (Tr. 869ff; cf. Tr. 42). In response to the Government's proffer, the trial court proposed, as an alternative, that counsel for both the Government and Guthrie enter into a stipulation concerning this issue. (Tr. 870). The next day, after hearing oral argument on the admissibility of evidence concerning the California scheme, Judge Bonsal, after indicating that he had read and considered the Government's Similar Act Memorandum (including the uncontroverted offer of proof, *supra*), and taking note that the California conviction involved fraud by Guthrie (Tr. 379),** ruled that, on balance, the probative value of this

* This offer of proof was, quite properly, considered by Judge Bonsal in determining the admissibility of this evidence (Tr. 876: "I have the Government's brief on this which I have read and considered"). Fed. R. Evid. 104(a). See also *United States v. Petrozziello*, 548 F.2d 20 (1st Cir. 1977); Advisory Committee Note to Fed. R. Evid. 104(a). Perhaps more significantly, as noted *supra*, this offer was not controverted by Guthrie either in the trial court (Tr. 876ff) or on this appeal.

** In his brief, Guthrie makes much ado about the trial judge's lack of knowledge concerning his prior conviction. (App. Br. 42-43). From this he argues that no similarity of conduct was shown. This is nonsense. Apart from Judge Bonsal's unequivocal statement that he had read and considered the Government's offer concerning this similar act proof (Tr. 876), the comments alluded to by defense counsel were made, not in response to the Government's offer, but rather in responses limited to questions concerning the California substantive counts. As such, they are irrelevant here.

earlier conviction outweighed any prejudiced to the defendant (Tr. 880), especially considering the close proximity between the events underlying the California conviction and the transactions at bar (Tr. 882), and, therefore, that he was prepared to receive proof of this similar act, limited to the issues of Guthrie's knowledge and intent with regard to the charges then before the jury. (Tr. 881). Having so ruled, Judge Bonsal again suggested that a stipulation was the preferable method of introducing this proof. (Tr. 881ff). Confronted by this ruling, Guthrie's counsel agreed with the Government to the stipulation recited above (Tr. 963ff), and it was thereupon read to the jury. (Tr. 972).*

* Guthrie's present argument that this stipulation, which he agreed to, failed to sufficiently apprise the jury of the facts underlying the conviction and therefore unfairly acted to his detriment, are preposterous in light of his consent to the precise wording used. Moreover, the Government originally wanted to have the jury fully informed concerning the precise nature of the California scheme. For example, the Government initially proposed the introduction of both the Indictment and the California judgment. (*E.g.*, Tr. 870). Then, during oral argument on the question of the admissibility of this evidence, the Government, in response to a question from defense counsel concerning the wording of such a stipulation, indicated its position that any stipulation should contain more than a mere recital of the fact that Guthrie had been previously convicted of a conspiracy in violation of the law prohibiting interstate transportation of stolen property. (Tr. 882). Again, during the charging conference, the Government reiterated its concern that the jury should be aware of the precise nature of the California conviction. (Tr. 1005-06). Indeed, Judge Bonsal agreed with the Government's suggestion (Tr. 1006); however, this was vigorously objected to by defense counsel, who preferred to have the jury think of Guthrie "as a common thief . . . rather than an uncommon one." (Tr. 1007).

Thus, for reasons of strategy and tactics, defense counsel plainly preferred to have the jury *not informed* concerning the facts of the prior conviction. Clearly, in this case, to have put before the jury the fact that the same defendant now on trial for an "ad-

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The law in this Circuit is clear, especially since the advent of Fed.R.Evid. 404(b), that "[e]vidence of prior criminal acts is admissible *unless* offered *solely* to prove criminal character or disposition or the proffered evidence is of such a *highly* prejudicial nature as to *overwhelm* its probative value." *United States v. Magnano*, 543 F.2d 431, 435 (2d Cir. 1976), *cert. denied*, — U.S. — (1977) (emphasis added).^{*} Equally well settled

vance fee" swindle had been convicted for engaging in a similar swindle only a short time earlier, would have had a far greater impact than the limited statement in the stipulation. *Cf.*, *United States v. Puco*, 453 F.2d 539, 542-43 (2d Cir. 1971), *cert. denied*, 414 U.S. 844 (1973). Hence, it is disingenuous in the extreme for Guthrie now to argue lack of clarity and a failure to more fully inform the jury of the facts regarding Guthrie's prior activities. *Cf. Henry v. Mississippi*, 379 U.S. 443 (1965).

Moreover, the fact that Judge Bonsal indicated that unless the defendant agreed at least to the bare recitation contained in the stipulation, he was prepared to receive the judgment of conviction, did not prevent Guthrie from insisting that more facts be disclosed in the stipulation. Faced with what plainly were the facts of the California swindle and with the Government's pre-trial offer of proof, Guthrie elected to keep from the jury the sordid facts of his prior conviction. Seen in this context, he was simply not "railroaded" into anything. To the contrary, he was able to minimize the effect of this type of evidence.

In any event, this contention matters little in view of the evidentiary propriety of the stipulation presented to the jury.

^{*} Accord, *United States v. Braunig*, 553 F.2d 777 (2d Cir.), *cert. denied*, — U.S. — (1977); *United States v. Grady*, 544 F.2d 598, 604-05 (2d Cir. 1976); *United States v. Viruet*, 539 F.2d 295, 297 (2d Cir. 1976); *United States v. Chestnut*, 533 F.2d 40 (2d Cir.), *cert. denied*, 429 U.S. 829 (1976); *United States v. Santiago*, 528 F.2d 1130 (2d Cir.), *cert. denied*, 425 U.S. 972 (1976); *United States v. Natale*, 526 F.2d 1160 (2d Cir. 1975), *cert. denied*, 425 U.S. 950 (1976); *United States v. Leonard*, 524 F.2d 1076 (2d Cir. 1975), *cert. denied*, 425 U.S. 958 (1976); *United States v. Papadakis*, 510 F.2d 287 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975); *United States v. Deaton*, 381 F.2d 114 (2d Cir. 1967).

are the propositions that "[i]t is the similarity of conduct which determines relevancy [hence, admissibility], not identity of language in the statutes violated",* and that, in admitting such proof, the trial court is accorded a "wide range of discretion."**

* *United States v. Santiago*, *supra*, 528 F.2d at 1134. Accord, *United States v. Natale*, *supra*, 526 F.2d at 1173-74; *United States v. Leonard*, *supra*, 524 F.2d at 1091; *United States v. Gerry*, 515 F.2d 130, 141 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975).

It is abundantly clear that the intent elements of the California crimes and the crime charged here are most similar. Each substantive count of the California indictment on which Guthrie was convicted (Counts 10, 11, and 12) charged fraudulent intent as a necessary element of the offense—just as it was in this case. Similarly, the conspiracy count (Count 1) charged that as part of the conspiracy the defendant engaged in a scheme to defraud (paragraph 7), created sham corporations to execute this scheme to defraud and to deceive investors (paragraph 9), and fraudulently offered to sell commodities and to provide insurance guaranteeing their performance (paragraph 10). The similarity, if not congruence, of intent is apparent.

** *United States v. Santiago*, *supra*, 528 F.2d at 1135. Accord *United States v. Braunig*, *supra*; *United States v. Albergo*, 539 F.2d 860, 863 (2d Cir. 1976), *cert. denied*, — U.S. — (1977): "The balancing of relevance against prejudice is primarily for the trial judge; and without a showing of abuse, his exercise of discretion will not be overturned."; *United States v. Natale*, *supra*.

Similarly, it is clear that the Government was entitled to prove similar acts relating to the defendant's knowledge and intent on its direct case, especially where, as here, specific intent was an element of the crimes charged, and where the defendant has placed his knowledge and intent in issue before the jury, as was the case here (Tr. 39), as in most fraud prosecutions, see p. 20-21, *supra*. See *United States v. Freedman*, 445 F.2d 1220, 1224 (2d Cir. 1971); *United States v. DeCicco*, 435 F.2d 478, 483 (2d Cir. 1970); *United States v. Kaplan*, 416 F.2d 103, 104 (2d Cir. 1969); *United States v. Gardin*, 382 F.2d 601, 604 (2d Cir. 1967). See generally, *United States v. Robinson*, Dkt. No. 76-1153, slip op. 5021, 5023-24 (2d Cir., July 28, 1977) (*en banc*) (trial court's decision to admit evidence "should not be disturbed for abuse of discretion in the absence of a showing that the trial judge acted arbitrarily or irrationally").

As Judge Bonsal made plain to the jury (Tr. 973; 1136),* the California conviction was admitted for a limited and proper purpose, namely, as bearing on Guthrie's knowledge and intent with regard to the crimes charged, and not to paint him with a broad brush as a "bad man," as the defendant now suggests. Guthrie's attempts to portray the stipulation—which, favorably to him, omits the details of the California offenses**—as an

* Without either having submitted a request to charge relative to this similar act evidence, or having excepted to the District Court's charge on this ground (Tr. 1143-44), Guthrie now complains that Judge Bonsal's charge concerning this proof constituted plain error. This claim is baseless. In the first place, Judge Bonsal's instructions were both ample and in accordance with the applicable law. (Tr. 1136). Moreover, not having complained below, Guthrie has clearly waived this issue on appeal. Fed. R. Crim. P. 30; *United States v. Natale*, supra, 526 F.2d at 1174; *United States v. Indiviglio*, 352 F.2d at 276 (2d Cir. 1965) (*en banc*), cert. denied, 383 U.S. 907 (1966).

** Obviously, this California similar act proof was, in the abstract, admissible against Guthrie, simply because it encompassed conduct clearly similar to that for which he was on trial in the Southern District of New York. Had witnesses been called to testify concerning this California conduct, the fact of his conviction there could have been developed as well. See *United States v. Nolan*, 551 F.2d 266, 269-72 (10th Cir. 1977). More significantly, if a number of witnesses had been called to establish that Guthrie had previously acted with knowledge and criminal intent, this would have involved a lengthy and detailed presentation of proof which necessarily would have been more "prejudicial" to Guthrie and would have increased the potential for confusion in the minds of the jury. Indeed, if the negative aspect of the proof of a similar act is the possibility that the defendant has a demonstrably criminal character, this unintended effect is more likely to arise if numerous, and possibly repetitive, witnesses were called to testify to the sordid details of a prior crime, rather than, as here, only the judgment of conviction is introduced. See, e.g. *United States v. Rosenwasser*, 550 F.2d 806, 811 (2d Cir. 1977) (Gurfein, J., dis-

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abuse of the trial court's "wide discretion" is pure sophistry.

Under Fed. R. Evid. 803(22), and the antecedent caselaw in this Circuit,* the admission of the stipulated judgment of conviction "to prove any fact essential to the judgment,"** *id.*, was proper simply because Guthrie's knowledge and fraudulent intent clearly were essential elements of the crimes of which he was convicted in California.*** Thus, a number of courts which have

sending) ("a record of conviction was available to establish the commission of the offense. There was no need for oral testimony about the facts involved in the 'other crime'.")

In sum, proceeding in the manner that it did, the District Court did not prejudice the defendant—indeed it minimized the prejudicial effect of this proof by not permitting its relevancy to "be entirely obscured by the dirty linen hung upon it." *United States v. Bradwell*, 388 F.2d 619, 622 (2d Cir.), *cert. denied*, 393 U.S. 867 (1968).

* *United States v. Eliano*, 522 F.2d 201, 202 (2d Cir. 1975; *per curiam*) (where the court allowed the admission of a judgment as proof of a similar act); *United States v. Vario*, 484 F.2d 1052, 1054-55 (2d Cir. 1973), *cert. denied*, 414 U.S. 1129 (1974) ("the proper way to introduce evidence of a prior conviction is to produce the judgment of conviction . . ."); *United States ex rel. Lasky v. LaVallee*, 472 F.2d 960, 964 (2d Cir. 1973).

** This rule goes on to state that such prior judgments may be used "for purposes other than impeachment" when offered against a defendant in a criminal case, thus clearly recognizing the applicability of such proof under Fed. R. Evid. 404(b). See Judge Gurfein's dissenting opinion in *United States v. Rosenwasser*, *supra*, 550 F.2d at 811-12.

Fed. R. Evid. 803(22) also provides that "[t]he pendency of an appeal may be shown but does not affect admissibility" and, for this reason, the stipulation made reference to Guthrie's pending appeal to the Ninth Circuit.

*** For this reason, Guthrie errs when he argues that the prosecutor overstepped his bounds in arguing to the jury in summation that:

"As you ladies and gentlemen learned last week, just around the time that Guthrie was swindling Fucillo and Wilson, he was being tried and convicted out in the

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federal court in Los Angeles of engaging in a criminal conspiracy, a criminal partnership with other people, to violate the law as well as of committing other crimes which required him to be found to have acted with fraudulent intent.

* * * * *

The case on trial before you, ladies and gentlemen, Sy Guthrie is charged with having joined together with others, this entourage which he assembled, and with having acted with fraudulent intent.

As Judge Bonsal will tell you, the evidence of these other crimes committed by Sy Guthrie in California can be considered by you for only a very limited purpose, as evidence which you may utilize in order to probe the question of whether Sy Guthrie went into the schemes to defraud Wilson and Fucillo with knowledge of their criminal character and with the specific intent to defraud these victims of their money." (Tr. 1041-42).

The Assistant United States Attorney was urging the jury to consider exactly what Fed. R. Evid. 803(22) allows—the facts essential to the California conviction, including joining with others in a conspiracy and acting with fraudulent intent, see note *supra*, 32-34. The prosecutor's comments not only properly highlighted the relevant portions of Guthrie's California conviction for the jury and made plain why this evidence was before them, but quite clearly cautioned the jury concerning their use of this proof. When these comments in summation were coupled with Judge Bonsal's proper instructions, the defendant's rights were fully protected. *United States v. Barclift*, 514 F.2d 1073, 1075 (9th Cir.), *cert. denied*, 423 U.S. 842 (1975).

Moreover, any prejudice against Guthrie was equally deflated by defense counsel's own argument to the jury concerning this proof. (Tr. 1104-05). Indeed, the jury was then presented with exactly the same arguments now facing this Court, including the erroneous contention that the California conviction did not result from "a fraud case." (Tr. 1105). In addition, Guthrie's lawyer also cautioned the jury concerning its use of this proof. (*Id.*) The jury could not have been misled into viewing the California conviction on the question of propensity.

considered this question have upheld the use of the judgment of conviction as proof of similar acts.

In *United States v. Morrow*, 537 F.2d 120, 147 (5th Cir. 1976), a case involving, *inter alia*, mail fraud, wire fraud and conspiracy charges, the Court approved the introduction into evidence as a similar act a 1973 judgment of conviction for the crimes of conspiracy and possession of stolen goods, stating:

"Appellant Brennan also challenges the introduction by the Government of his federal conviction in June, 1973, for conspiracy and possession of goods stolen from interstate commerce. See Government's Exhibit No. 154, 18 U.S.C. §§ 371, 659. As with the convictions of appellants McConnell and Dondich discussed above, the *district court did not allow the Government to introduce evidence of the conduct underlying appellant Brennan's prior conviction. Nevertheless, the Government sought and the district court allowed introduction of one conviction to show intent and knowledge on the part of appellant. The Government's proffered evidence of the conduct underlying the conviction, which the jury never saw, would have shown [the similarity of the crime there to that at bar] . . . Applying the four-step test enunciated in United States v. San Martin, 505 F.2d 918, 921-22 (5 Cir. 1974), we hold that the district court properly allowed the Government to introduce appellant Brennan's prior conviction: (1) the Judgment of Conviction introduced by the Government demonstrated clearly and convincingly the existence of the prior similar offenses, (2) the 1973 conviction was not too remote in time from the instant prosecution, (3) appellant Brennan's intent was a material issue in the trial below, and*

(4) there was a substantial need for evidence bearing on the issue of intent [emphasis supplied].”*

Thus, the settled weight of authority permits—indeed, commends—exactly the procedure employed by Judge

* See also *Id.* at 141-45. Accord, *United States v. Eliano*, *supra*; *United States v. Barclift*, *supra*; *United States v. Easley*, 505 F.2d 184, 185 (9th Cir. 1974); *United States v. Shadletsky*, 491 F.2d 677, 677-78 (5th Cir.), (“Proof of the mental ingredients of the prior offense need not be shown, because the significance of the prior conduct is that it tends to prove a pattern of criminal conduct pointing directly toward the act charged, from which the trier of fact can infer circumstantially the intent and knowledge with which the act charged was committed.”), *cert. denied*, 419 U.S. 830 (1974); *United States v. Nolan*, *supra*, 551 F.2d at 269-72.

Analogy can also be made to the admission of a prior conviction under Fed. R. Evid. 609(a) and the decisions of this Court thereunder. See *e.g.*, *United States v. Hayes*, 553 F.2d 824 (2d Cir. 1977); *United States v. Ortiz*, 553 F.2d 783 (2d Cir. 1977). As Judge, now Chief Justice, Burger said in *Gordon v. United States*, 383 F.2d 936, 940 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 1029 (1968), this is so because “[i]n common human experience acts of deceit, fraud, cheating, or stealing, for example, are universally regarded as conduct which reflects adversely on a man’s honesty and integrity”—and, based *simply on a judgment of conviction for such crimes*, a jury can infer a defendant’s lack of veracity. In the instant case, Guthrie was convicted of fraud in January 1976, following a trial in the fall of 1975, at the very time that the crimes charged here were being committed. Such a conviction, under Rule 609(a)(2), clearly was admissible on the question of the defendant’s veracity had he testified. A different result is not called for when the conviction is placed before the jury in the Rule 404(b) context, since the same inference can be drawn: a lack of veracity on Guthrie’s part. Since, Guthrie was charged with lying to his victims, such an inference by the jury would clearly be probative on his knowledge and *intent*. As the fact of conviction alone was probative to his willingness to deceive the victims who Guthrie claims he had no intent to defraud, he clearly was not prejudiced by its admission.

Bonsal here.* This Court has recognized the deference which an appellate court should accord to the district court in decisions of this kind. In *United States v. Robinson*, *supra*, slip op. at 5032, this Court, *en banc*, observed that the weighing of the probative value of similar act evidence against its potentially prejudicial effect was primarily for the trial judge who had a feel for the case and was in a superior position to evaluate its impact on the jury. See also *United States v. Leonard*, *supra*, 524 F.2d at 1092; *United States v. Ravich*, 421 F.2d 1196, 1203-04 (2d Cir.), *cert. denied*, 400 U.S. 834 (1970). The direct probative value of the prior conviction in assessing Guthrie's knowledge and intent in this case is plain. Equally plain is that the clear probative value of this evidence was not "substantially outweighed by the danger of unfair prejudice . . .", Fed. R. Evid. 403, especially since, as noted *supra*, the manner in which this proof was presented tended to minimize any prejudice resulting therefrom. Most importantly, recognizing that the "trial judge's discretion in performing this balancing function is wide," *United States v. Robinson*, *supra*, slip op. at 5032, 5033-34, and given the fact that Judge Bonsal, acting in a non-arbitrary and totally rational manner, engaged in just such a balancing process here (Tr. 880) and resolved the issue presented in favor of admissibility, the trial court's action must be upheld.

* Guthrie relies heavily upon *United States v. Klein*, 515 F.2d 751 (3d Cir. 1975), to support his position. That decision is, however inapposite for a number of reasons. In *Klein*, the court found no factual similarity between the prior crime evidenced by a judgment of conviction, and thus, the prior act was without probative value—clearly not the case here. Also, the court there found that the jury was not fully informed concerning the prior crime; here, the paucity of information received by the jury was a direct result of defense counsel's tactical election, *supra*. Finally, the court in *Klein* was operating under the Third Circuit's exclusionary rule toward similar acts, *id.* at 755, prior to the advent of Fed. R. Evid. 404(b) and contrary to this Circuit's long standing inclusory rule. *United States v. Deaton*, *supra*.

POINT III**Testimony Concerning Guthrie's Conduct Toward Maryland Casualty Co. Was Proper.**

Guthrie lastly challenges the admission of Cauble's testimony concerning Guthrie's past conduct toward the Maryland Casualty Co. Since there was an insufficient objection below and, further, because this testimony is admissible in any event, this contention is frivolous.

Cauble testified that during the meeting that occurred at Goldberg's home in December 1975, Goldberg, in Guthrie's presence, informed the assembled group that "he did not want to . . . [state] who the bonding company was because he had been compromised a year or so ago and had lost Maryland Casualty as the bonding company he wrote for because it had been misused." (Tr. 683). Cauble followed this testimony by further recounting that, two or three days later (Tr. 685), he again met with Goldberg and at that time:

"I kept pressing for the name of the bonding company and he told me he had been compromised approximately a year before, that Mr. Guthrie and Mr. Lipton [one of Guthrie's co-conspirators in the California scheme] had written commitments on his letterhead committing Maryland Casualty and caused them not to do business with him any longer. He lost a very lucrative insurance company." (Tr. 686).*

* Prior to this testimony being received, defense counsel objected only on the ground that the Government was attempting to elicit proof of a similar act without prior notice to the defendant. (Tr. 684). Judge Bonsal, after hearing the Government's offer of proof (Tr. 684-85), properly overruled this objection. (Tr. 685).

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This testimony was properly received.*

As should be recalled, the principal factual issue in this case was whether Guthrie (and Cauble, as well) had made knowingly false statements to his victims concerning his ability to procure the financial guarantee bonds which he had promised. The foregoing testimony, which directly contradicted a number of Guthrie's representations** and showed them to be palpable lies, was properly

Notwithstanding this, on appeal Guthrie again complains about lack of prior notice and relies on *United States v. Baum*, 482 F.2d 1325 (2d Cir. 1973). The facts of *Baum* show its clear inapplicability to the situation here, where Cauble had pled guilty and begun to cooperate with the Government only the day prior to trial. In any event, if Guthrie was truly prejudiced by this "surprise" testimony—testimony about which counsel seemed fully cognizant prior to its actual elicitation (see, e.g., Tr. 684)—he should have requested a continuance. He did not do so and cannot now complain. Cf. *United States v. Pineros*, 532 F.2d 868, 872 (2d Cir. 1976); *United States v. Cotroni*, 527 F.2d 708, 713 (2d Cir. 1975); *United States v. Leonard*, *supra*; *United States v. Baum*, *supra*. Most importantly, however, since this was not proof of a similar act, no notice was required. *United States v. Carroll*, 510 F.2d 507, 509 (2d Cir. 1975), *cert. denied*, 426 U.S. 923 (1976).

* In addition to his other arguments, defendant contends that the trial court erred in not instructing the jury concerning the limited purpose for which this testimony was received. (App. Br. 56). This claim is faulty for two reasons. First, because this testimony was *not* received for a limited purpose, and, second, even if received only as proof of a similar act, because Guthrie never asked the trial judge to give such a limiting instruction and, therefore, is in no position to complain about its absence now. See *United States v. Papadakis*, *supra*, 510 F.2d at 295 and the case collected, *supra* p. 40.

** For example, in his tape recorded conversation with Fucillo on December 12, 1975, Guthrie claimed that Fucillo's bond would be secured from "Maryland Casualty". (GX 3). In addition, Cauble, who similarly knew this information to be false, not only advised Glass (Tr. 318), but Fucillo as well that his bond would be secured through Maryland Casualty. (GX 3). Similarly, during their meeting with Wilson and Jones on December 11th, these

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introduced to prove both the falsity of such statements and Guthrie's knowledge of this falsity. Since this proof showed that Guthrie was aware that, because of his prior actions, Maryland Casualty Co. never would write the bonds for Fucillo and Wilson, his statements to the contrary clearly evidenced his intent to fleece these victims.

In such circumstances, admission of this proof was proper, not as a similar act,* but as proof of the crimes in chief, because, as this Court stated in *United States v. Eury*, 268 F.2d 517, 520 (2d Cir. 1959): "As we have so often held, evidence relevant to the proof of one crime is not incompetent because it discloses the commission of another." **

victims were told that their bond would be issued by "Maryland Casualty". (Tr. 854; 930). Since at the time these statements were made, both Guthrie and, perhaps, Cauble knew them to be false, the Government was entitled to show both their falsity and Guthrie's knowledge of their falsity.

* This proof, even if couched in terms of "similar act" was admissible under Fed. R. Evid. 404(b) and the cases noted at p. 38, *supra*.

** See, *e.g.*, in addition to the Second Circuit decisions cited in *Eury, supra*, *United States v. Eliano, supra*, 522 F.2d at 202 (defendant's prior state conviction introduced on Government's case to show motive and to corroborate testimony of Government witness); *United States v. Papadakis, supra*; *United States v. Andreadis, supra*, 366 F.2d at 433 (defendant's prior convictions introduced on Government's direct case, in mail fraud prosecution, as proof of fraudulent representations by the defendants); *United States v. Kahner*, 317 F.2d 459, 471 (2d Cir.), *cert. denied*, 375 U.S. 835 (1963); *United States v. Barrett*, 280 F.2d 889, 890 (2d Cir. 1960). See also, in other Circuits, *United States v. Miller*, 508 F.2d 444, 449 (7th Cir. 1974); *United States v. Martin*, 489 F.2d 674, 676 (9th Cir. 1973), *cert. denied*, 417 U.S. 948 (1974); *Welch v. United States*, 371 F.2d 287, 294 (10th Cir.), *cert. denied*, 385 U.S. 957 (1966).

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This testimony was introduced as proof of the charges for which Guthrie was then on trial and the law "does not demand exclusion of [such] highly probative evidence simply to prevent noisome odors about the defendant from reaching the jury's nostrils," *United States v. Bradwell*, *supra*, 388 F.2d at 622,* and its receipt by the district court was proper in all respects.

Indeed, as Judge Weinstein and Professor Berger have observed:

"At times it may be quite impossible to prove the case without revealing other crimes. The court cannot 'fragmentize the event under inquiry.' If an understanding of the event in question, or if a description of the immediate circumstances, reveals other crimes than those charged, exclusion will lead to a highly artificial situation at the trial making understandable testimony unlikely." (2 Weinstein & Berger, *Weinstein's Evidence* ¶ 404[08] at 404-45).

* As noted, the defendant's only objection to this proof was that it constituted a similar act of which he had not received ample notice. When this objection was properly overruled by the District Court, no further objection or ground for objection was stated by defense counsel and, thus, Cauble's testimony was received without any restriction or limitation. Fed. R. Evid. 103 (a)(1). Consequently, Guthrie cannot now be heard to object to the testimony as hearsay.

The law is well settled that a general objection, if overruled, cannot avail the objector on appeal and a specific objection overruled will be effective to the extent of the grounds specified, and no further. *United States v. Indiviglio*, *supra*. See also *United States v. Bryant*, 480 F.2d 785 (2d Cir. 1973); *United States v. Del Llano*, 354 F.2d 844 (2d Cir. 1965) (en banc); cf. *United States v. Braunig*, *supra*, 553 F.2d at 780. Having failed to specifically raise a hearsay objection in the trial court, Guthrie waived any objection on this ground. Nor can Guthrie hope to salvage his argument by grabbing on to the bootstrap of plain error. Clearly, this is not such a case, *United States v. Floyd*, 555 F.2d 45 (2d Cir. 1977), and any error on this score must be viewed as harmless, in view of the overwhelming proof of the defendant's guilt. Moreover, as this Court has said, "absent appropriate objection . . . appellant cannot now complain about the Government's reference to [this testimony] in summation." *United States v. Edelman*, 414 F.2d 539, 542 (2d Cir.), *cert. denied*, 396 U.S. 1053 (1970).

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CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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Lastly, even were this Court to find that an objection on this hearsay ground was properly preserved for this appeal, this entire conversation between Cauble and Guthrie was in furtherance of the conspiracy and as such properly admissible under Fed. R. Evid. 801(d)(2)(E). Goldberg's refusal to tell Cauble which company would be furnishing the bond had two effects: first, it permitted Goldberg to suggest that some bond would be obtained when, in fact, Goldberg never intended to secure any bond at all, and second, it forced Cauble, who himself may have been a partial dupe, to return to his victims with more false tales as to when and from whom a bond would be forthcoming. Moreover, while Guthrie now argues that the statement as to why Goldberg would not reveal the name of the bonding company could have been redacted or only partially elicited, a statement of one conspirator to another during the active course of the conspiracy, giving the full setting of a state of facts with the purpose of getting reassurance or other help, does not cease to be in furtherance of the conspiracy because it contains a reference to past events. *United States v. Pardo-Bolland*, 348 F.2d 316, 324-25 (2d Cir.), *cert. denied*, 382 U.S. 944 (1965). Indeed, it was entirely proper to have the entire conversation before the jury. *United States v. Grant*, 462 F.2d 28, 33-34 (2d Cir.), *cert. denied*, 409 U.S. 914 (1972). See also *United States v. Dorfman*, 470 F.2d 246, 248 (2d Cir. 1972), *cert. dismissed*, 411 U.S. 923 (1973); McCormick, *supra*, § 267 at 645; *cf. United States v. Annunziato*, 293 F.2d 373, 380 (2d Cir.), *cert. denied*, 368 U.S. 919 (1961).



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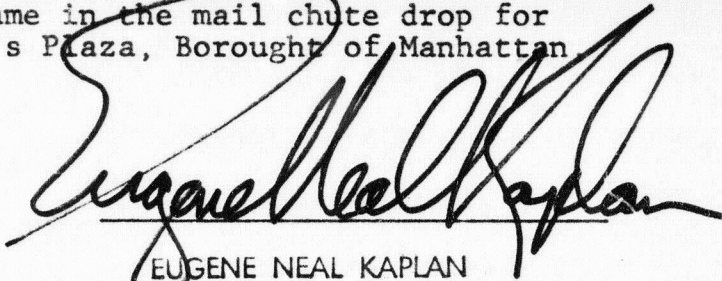
STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

EUGENE NEAL KAPLAN being duly sworn,
deposes and says that he is employed in the office
of the United States Attorney for the Southern District
of New York.

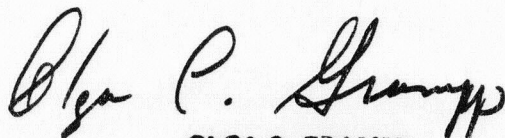
That on the 25th day of August 1977
he served a copy of the within Order
by placing the same in a properly postpaid franked
envelope addressed:

John F. Triggs, Esq.
Glass Greenberg, Irwin Bellman & Slade
540 Madison Avenue
New York, N.Y. 10022

An deponent further says that he seal the said envelope and placed the same in the mail chute drop for mailing at One St. Andrew's Plaza, Borough of Manhattan City of New York.


EUGENE NEAL KAPLAN

Sworn to before me this
25th day of August, 1977



OLGA C. GRAMPP
Notary Public New York State
No. 43-688636
Qualified in Richmond City.
Comm. Expires March 30, 1979